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APPENDIX A	

The Petitioners, JAMES RILEY, JR., and FRANK MARSHALL, respectfully pray that a Writ of Certiorari issue to review the Order and Judgment and Mandate of the United States Court of Appeals for the Ninth Circuit dated May 28, 1969, and the Order denying Petition for Rehearing dated June 20, 1969.

A. OPINIONS BELOW

Copy of the Order of the United States Court of Appeals for the Ninth Circuit, dated May 28, 1969, is attached hereto as "Appendix A."

B. JURISDICTION

Jurisdiction of this Court is conferred by 28 U. S. C. and acknowledged in 28 U. S. C. A. Rules of the Supreme Court, Rules 19, 21, 22 and 23.

C. QUESTIONS PRESENTED FOR REVIEW

Whether or not the evidence, to wit, a plastic sack containing about 5 ounces of heroin, removed from a state vehicle after Petitioners had been removed therefrom and following a period during which the vehicle was unattended, under all the circumstances, was so illegally obtained as to be inadmissible under applicable constitutional provisions.

Whether there was probable cause for the apprehension (arrest) of Petitioners at the state building prior to the location of any contraband, under applicable constitutional provisions.

Whether there was probable cause for the prior apprehension and search of Petitioners near Marana, Arizona, as a result of which nothing was found but money.

Whether the facts adduced by Respondent at

trial sufficiently proved the jurisdictional fact of possession requisite to survival of Respondent's case past appropriate motion.

Whether certain alleged statements of Petitioners' admitted into evidence were not in fact illegally seized evidence following an unlawful arrest based upon insufficient probable cause, all in violation of applicable constitutional provisions.

Whether the jurisdictional fact of possession was ever sufficiently shown so as to allow jury verdict thereon.

Whether Petitioners' rights under the Sixth Amendment were violated when the trial court both in the Motion to Suppress and at trial refused to require disclosure of the name of the informant.

Whether the failure of the trial court to require disclosure of the informant violated applicable constitutional provisions relative to the

applicability of the informer's claimed information on the issue of existing probable cause for the ultimate search and prior arrest thereto.

Whether the trial court held in contradiction to existing Supreme Court decisions when it failed to require corroboration of the informer by facts additional to the informer within the personal knowledge of the arresting or searching officer.

Whether the trial court was in conflict with existing Supreme Court decisions in failing to require a showing of personal knowledge as to facts stated either by the arresting or searching officer, or at least by the informer himself.

Whether the trial court, in ruling that the seizure of the sack of heroin was legal because the property was abandoned, is not in conflict with the facts resulting in deprivation of constitutional rights relative to search and seizure and arrest.

Whether the presumption contained in Title 21, Section 174, U. S. C. A. is constitutionally presumable 1) upon the facts presented; 2) upon any legal basis whatever.

D. CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life

or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT IX

The enumeration in the Constitution of cer-

tain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. STATEMENT OF THE CASE

In 1967, Petitioners were arrested at Tucson, Arizona, in connection with the recovery of 5.2 ounces of heroin in a plastic sack. They were indicted for conspiracy to violate 21 U. S. C. Sections 173 and 174, and for violation of 21 U. S. C. Section 174 in a second count, both counts being predicated on certain alleged actions of Petitioners relating to heroin which it was charged

they "knew" had been imported into the United States from Mexico contrary to law.

Trial was had and Petitioners were found guilty on September 8, 1967, of the counts, and each sentenced to substantial terms of imprisonment.

Appeal was taken to the United States Court of Appeals for the Ninth Circuit where it was raised and denied.

Application for Rehearing was made and denied.

Petitioner FRANK MARSHALL is proceeding in Forma Pauperis.

F. STATEMENT OF THE STATE OF PROCEEDINGS IN THE LOWER COURT, AND THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The federal questions sought to be reviewed were raised in: Petitioners' Motion to Suppress

Evidence made prior to trial (see separate transcript thereto) and in Motion to Dismiss made at the end of the Respondent's case and again reviewed at the close of all the evidence, and in Motion for New Trial.

Furthermore, many of the questions raised were urged by appropriate motion and objections during the course of the trial.

Chief transcript references (by the Official Reporter) supporting these questions are as follows(although they are not all of the references by any means): [Reference shall be made as follows, transcript of testimony as "TR" followed by volume and page and line numbers]

TR 1, p. 139, ll. 15-22; TR 1, p. 140, ll. 4-23, p. 141, ll. 5-11; TR 1, p. 141, ll. 12-20; TR 1, p. 145, ll. 17-22; TR 1, p. 147, ll. 3-15; TR 1, p. 147, ll. 17-24; TR 2, p. 210, ll. 20-25; TR 2, p. 211, ll. 1-2; TR 2, p. 223, ll. 20-21;

Motion to Suppress [hereafter "MS], p. 11, ll. 20-21; MS, p. 11, ll. 22-23; MS, p. 12, ll. 2-6; MS, p. 12, ll. 1-13; MS, p. 12, ll. 14-17; MS, p. 12, ll. 18-22; TR 1, p. 148, ll. 10-13; TR 1, p. 148, ll. 16-24; TR 2, p. 165, ll. 1-4; TR 2, p. 224, ll. 9-14; TR 2, p. 224, ll. 22-25; p. 225, ll. 1-3; TR 2, p. 232, ll. 13-25; TR 2, 233 and 234, in full; TR 2, p. 227, ll. 20-25; TR 2, p. 169, ll. 12-24; TR 2, p. 175, ll. 1-6; TR 2, p. 223, ll. 18-25; TR 2, p. 183, ll. 1-7; TR 2, p. 252, ll. 19-23; considerable testimony relative to the informer is scattered throughout the Motion to Suppress transcript.

The questions presented relative to the constitutionality of the presumption contained in Title 21, Section 174, U. S. C. A., is raised herein for the first time due to the recent decision in Leary vs. United States, Opinion No. 65, 37 Law Week 4397 (May 19, 1969). (Although

the question whether the jurisdictional fact of possession was ever shown, was raised below and is not dependent upon the holding)

G. FEDERAL JURISDICTION BELOW

The District Court for the District of Arizona had jurisdiction of the matter by virtue of an Indictment returned alleging violations of 21 U. S. C. Sections 173 and 174.

The Court of Appeals for the Ninth Circuit had jurisdiction by virtue of Sections 1291 and 1294 of Title 23, United States Code.

H. ARGUMENT

This was a case of arrest and search without a warrant. Petitioners had been under an almost constant surveillance, which apparently revealed nothing, for when they were first apprehended and searched near Marana, Arizona, some money was

found on Petitioner RILEY, but nothing else, and they were released.

But thereafter, they were seen in a vehicle heading toward Tucson, Arizona, and again they were followed. At Tucson, near the Greyhound Bus Depot, they were apprehended and searched and placed in a government vehicle. Eventually, they were taken from the government vehicle and into the state building. Nothing was found on their persons, but after all persons had left the car, one of the agents went back out to the car and allegedly found the sack of heroin on the back seat thereof.

The only basis the government claimed to have for harrassing Petitioners in this manner was purported information received from an informant whose identity was never disclosed nor required to appear for cross-examination and questioning.

There was insufficient probable cause for the ultimate search and seizure and the arrest and the finding of contraband thereupon does not render the proceedings valid. Mapp vs. Ohio, 367 U. S. 643.

Similarly, of course, the same rule would apply as to purported statements of Petitioners allegedly made after the illegal arrest and search. Henry vs. United States (1959), 361 U. S. 98, 100-101, 80 S. Ct. 168, 170; Johnson vs. United States (1947), 33 U. S. 10, 68 S. Ct. 367.

The only basis relied on by the government to sustain probable cause was the information of the informer. But it was never shown that the information of the informer was corroborated by the personal knowledge of facts by an officer, or even by the informer himself. Draper vs. United States, 358 U. S. 307, 79 S. Ct. 329; Jones vs. United States, 362 U. S. 257, 80 S. Ct. 725. And

while the case itself involved a search warrant, the language of the opinion in Aguilar vs. Texas, 378 U. S. 108, 84 S. Ct. 1509, indicates strongly that there must be a showing to sustain a search that either the officer or the informant himself must be shown to have spoken with personal knowledge. At bar, the trial court required no such showing, and the Court of Appeals for the Ninth Circuit, in its opinion, clearly was at variance with the above opinions, to name just a few, of this Court.

The refusal of the trial court to require disclosure of the identity of the informer violated Petitioners' rights to procedural due process and to their Sixth Amendment rights on confrontation. At bar, the informer was virtually the sole demonstrative basis for probable cause for the ultimate search and arrest. Therefore, Petitioners should have been given a fair opportunity

to rebut that testimony and should have been permitted to know the identity thereof for purposes of questioning and possible introduction of impeaching testimony against that of the informer and officers. Priestly vs. Superior Court, 50 Cal. 2d 812, 818, 330 P. 2d 39, 43; Rovario vs. United States, 353 U. S. 53, 77 S. Ct. 623; Pointer vs. Texas (1965), 380 U. S. 400, 85 S. Ct. 1065, 1068; Costello vs. United States (9th C. A., 1962), 298 F. 2d 99, cert. den. 376 U. S. 930, 84 S. Ct. 699.

The trial court apparently was bothered by the true status of existing probable cause to justify the arrest and search of Petitioners, because in its findings of fact following Motion to Suppress, it held the seizure of the sack of heroin found in the back seat of the empty car to have been seizure of abandoned property and therefore valid. But before this sack was even found, Petitioners had

already been taken into custody, i.e., arrested. There could have been no "abandonment." Matthews vs. State (Maryland), 206 A. 2d 714; and if the property is found after an illegal arrest, it cannot be deemed to have been abandoned, anyway. Work vs. United States, 243 F. 2d 660.

The constitutional rights of petitioners were further violated when the trial court allowed the jury to consider their case, and then refused to set the convictions aside when the government completely failed to adduce clear and convincing evidence of the jurisdictional fact of possession, constructive or actual, being shown as to the sack of heroin, reference to either or both of the Petitioners. And this is a jurisdictional fact. Anthony vs. United States (Cal. C. A., 1964), 331 F. 2d 687.

Mere proximity to the contraband is not enough. Cipres vs. United States (Cal. C. A.,

9th, 1965) 343 F. 2d 95; Arellanes vs. United States (Cal. C. A., 9th, 1962) 302 F. 2d 603. At bar, the contraband was not physically taken into custody until after all parties had left the vehicle and were in the state building. There was a period during which the vehicle was entirely unattended. Furthermore, despite rigorous surveillance while Petitioners were in the vehicle, and a search of their persons thereafter, and observation of certain items in the car, no claimed contraband ever showed up until after the car had been left unattended for a time.

There was absolutely no showing of dominion and control knowingly over this contraband by either Petitioner. United States vs. Robinson, (N. Y. C. A., 1965) 354 F. 2d 109, cert. den. 86 S. Ct. 1965, 384 U. S. 1024. Thus, the Court of Appeals not only varied from opinions of other circuits, it did not even apply standards set forth

in its own previous opinion.

A review of the transcript shows no direct proof of the importation of the heroin into the United States from Mexico. And a total absence of proof of knowledge of any importation on the part of either Petitioner. And the Indictment at bar, in fact, only charges Petitioners with illegally handling the heroin after it had been illegally so imported into the United States from Mexico.

Consequently, the statutory presumption in 21 U. S. C., Section 174, even if valid on its face, should not have been allowed in this case. In Leary vs. United States, Opinion No. 65, 37 Law Week 4397 (May 19, 1969), this Court ruled that the presumption above as applied to marijuana is no longer constitutionally presumable as the factual basis for the presumption upon examination of authorities, does not exist. Heroin is a derivative of Papaver Somniferum, according to

the authority of W. L. Jepson, Manual of Flowering Plants of California, University of California Press, 1951; and according to Professor Charles Mason, Curator of Herbarium, University of Arizona, the plant grows wild in the States of Arizona and California. It would therefore seem appropriate that this Court should grant relief to Petitioners by remanding the case back to the District Court for the District of Arizona with leave to Petitioners to produce evidence attacking the fundamental factual basis of this statutory presumption, and thereupon report back to this Court.

Finally, the statutory presumption of aforesaid Section 174 necessarily is unconstitutional on its face as set forth in Leary as applied to heroin, as being in violation of Petitioners' Fifth Amendment privilege againse self-incrimination. And for the same reasons.

Petitioners specifically were not charged with failing to secure necessary order blanks for the handling and sale of heroin. But they were charged with knowingly receiving the heroin for purposes of concealing, buying, selling, etc., contrary to law. The phrase "contrary to law" necessarily adverts to the only lawful manner in which heroin can be possessed for buying or selling, to wit: Compliance with 26 U. S. C. Section 4705 (a) requiring an order form to be properly filled out. And in connection with that, then the ominous presence of 26 U. S. C. Section 4773, providing for dispersal of this information to appropriate authorities (state and local as well as federal) for their use.

In short, the only way in which Petitioners could have been legally possessed of the heroin would have been by compliance with corresponding statutes requiring self-incriminatory disclo-

sures identical in content and substance to those involved regarding marijuana and which resulted in the Leary holding.

Consequently, it is respectfully submitted that a Writ of Certiorari additionally should issue in this case for the full-scale consideration of this issue before this Court.

I. CONCLUSION

For all or any of the foregoing reasons, it is respectfully prayed that this Court grant a Writ of Certiorari, and for the overall relief that the Court reverse the judgments of conviction as to either or both of the Petitioners, or do so and grant a new trial, or alternatively, that the Court remand this case back to the United States District Court for the District of Arizona for the purpose of taking testimony on the issue of whether or not the factual evidence as to the

D.

existence or lack of existence of the plant Papaver Somniferum in Arizona and California would sustain or not sustain the congressional presumption set forth in Section 174.

Dated at Tucson, Arizona, this 18 day of July, 1969.

Law Offices of WILLIAM T. HEALY
1009 Tucson Federal Savings Tower
32 North Stone Avenue
Tucson, Arizona 85701

William T. Healy

WILLIAM T. HEALY

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

WILLIAM T. HEALY, being first duly sworn, deposes and says: That he is the attorney for the Petitioners herein; that he has read the foregoing Petition and annexed Appendix and that the contents thereof are true of his own knowledge except as to

the matters states upon information and belief, and as to those matters he believes them to be true.

William T. Healy

WILLIAM T. HEALY

SUBSCRIBED AND SWORN TO before me this 18 day of July, 1969.

Sherry Van Camp

Notary Public

My Commission Expires:

February 1, 1971

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

WILLIAM T. HEALY, being first duly sworn, deposes and says: That on the 18 day of July, 1969,

he has forwarded, by United States Mail, postage fully paid, to:

Solicitor General
Department of Justice
Washington, D. C.

and

Miss Jo Ann Diamos
Assistant United States Attorney
P. O. Box 1951
Tucson, Arizona 85702

one copy of the foregoing Application for Writ of Certiorari.

William T. Healy

WILLIAM T. HEALY

SUBSCRIBED AND SWORN TO before me this 18 day of July, 1969.

Sherry Van Camp

Notary Public

My Commission Expires:

February 1, 1971

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES RILEY, JR., and FRANK MARSHALL, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 22,511

[May 28, 1969]

On Appeal from the United States District Court for the District of Arizona

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Before: BARNES and DUNIWAY, Circuit Judges; and McNICHOLS, District Judge.

McNICHOLS, District Judge:

Appellants, James Riley, Jr. and Frank Marshall (hereinafter referred to respectively as "Riley" or "Marshall") were each convicted by jury verdict on both counts of a joint two count indictment. The first count charged a conspiracy by the two men to receive, conceal and transport an illegally imported narcotic substance, i.e., heroin. The second count charged the receipt, concealment and transportation of the heroin all in violation of Sections 173 and 174, Title 21, United States Code. Concurrent ten year sentences were meted out.

The principal errors relied on in the order to be discussed are as follows:

1. That the trial court erred in refusing to suppress evidence obtained as the result of an unlawful arrest where no probable cause for arrest existed.

2.(a) That proof was lacking that appellants ever had possession of the narcotic contraband.

(b) That even if possession in appellant Marshall was proved, there was a lack of proof of possession on the part of appellant Riley.

3.(a) That in custody statements of appellant Riley were improperly admitted in evidence, the same being the fruit of an illegal arrest.

(b) That it was error for the trial court to fail to caution the jury, on his own motion, that Riley's statements could not be considered by the jury against Marshall.

4. That it was error to refuse to order the government to disclose the identity of an informer whose communications were relied upon in making the arrests.

5. That a fatal variance developed between the dates alleged in the indictment and those disclosed by the proof.

6. That the United States Attorney, during closing argument, was guilty of prejudicial misconduct warranting a mistrial.

A review of the facts leading up to the arrest of the appellants and of the occurrences immediately thereafter is required.

Nogales, Arizona is a relatively small town located adjacent to the border between the United States and the Republic of Mexico. Nogales, Sonora, Mexico is across the international border from Nogales, Arizona. As is true of many such border towns, the port of entry at Nogales is frequently utilized for the unlawful smuggling of narcotics from Mexico to the United States. Considerable surveillance by customs authorities in Nogales, Arizona is carried out.

In the middle of the month of May, 1967, during such a surveillance, the appellant Riley was observed by customs officers in the company of a known drug trafficker, one Billy Joe Campbell. On May 21, 1967, customs agents were advised by an informant, whose prior tips had been very reliable, that two Negro men, associates of Campbell, were negotiating in Nogales, Mexico with one Poncho Martinez to purchase a large quantity of heroin. Both appellants in this case are Negroes. A few days later the same informant advised that the two Negro men had made a purchase of heroin, had transported it to Chicago, and would return to

Nogales, Arizona about June 5, 1967. The informant further advised that Martinez was going to another Mexican city to obtain an additional supply of narcotics and expected to meet the two Negroes in Nogales, Mexico on or about June 5, 1967.

On June 5, 1967, the appellants, with a Negro woman identified as Miss Stanley, registered in a motel in Nogales, Arizona. A surveillance of the appellants was established. During the day of June 5, 1967, they rented two different rental cars in Nogales, made numerous telephone calls on pay phone, and drove about the community. In the afternoon of that day, the appellants, with the woman companion, drove away from Nogales, Arizona toward the city of Tucson. The customs agent stopped appellants' car and searched the occupants. No contraband was found, but in searching appellant Riley, he was discovered to have approximately $5,000.00 in cash on his person. The surveillance continued and, at about 1:00 A.M. on June 6, 1967, the appellants and Miss Stanley reregistered at the same motel in Nogales, Arizona. They were seen again to make numerous phone calls and on several occasions one or the other would leave the motel in a taxicab. Finally, about 9:30 in the evening, the appellants and Miss Stanley left the motel in a taxi, went to the bus station where Miss Stanley boarded a bus, and the men then went on foot into Mexico. On June 7, 1967, the informant called the customs agent by telephone and advised that the two Negro males were in Nogales, Mexico waiting for Martinez to return. He described the men so that the officers easily recognized that the description matched that of the appellants. About 6:00 P.M. on June 7, 1967, the informant again called the customs officers and informed them that Martinez had returned to Nogales, Mexico and that appellants had made a purchase and had paid Martinez 50,000 pesos (about $4,000.00 in American money).

About 6:00 P.M. on June 7, 1967, appellants, first Riley and then a few minutes later Marshall passed through the Nogales port of entry on foot. The border inspection officers had been instructed to watch for them, report their return, but to let them pass without search.

Shortly thereafter appellants were observed by customs officers in a taxicab headed in the direction of Tucson, Arizona, a distance of sixty-seven miles from Nogales. The cab was followed

to the Tucson bus depot where the appellants were arrested as they emerged from the taxi.

A cursory "patting down" search for weapons was made at the bus depot and the appellants placed in the back seat of a police car and transported to a state facility for a more complete search. An officer testified that there was nothing on the back seat of the police car when the appellants entered the car. While in the car, Marshall was observed to put his hand inside his shirt and move it toward the right rear of his person. When the appellants were removed from the police car, a package was observed on the seat which later was found to contain some five ounces of heroin.

Inside the building a search of the persons of the suspects revealed no contraband. Appellants were advised of their constitutional right to remain silent and to have counsel. Riley thereafter attempted to speak and was advised by an officer not to say anything. However, he persisted and asked, "Did those Mexicans turn me in?"

From the foregoing, it is abundantly clear that the officers had reasonable cause to arrest the appellants. The informer was one whose prior tips had been very reliable. The activities of the appellants had been such as to arouse the suspicions of the officers. At least one of them had been associated with a known narcotics dealer; they had followed a course of changing cars; they made an unusual number of phone calls; they carried a rather unreasonably large amount of cash.[1] All of these activities aroused the suspicions of the experienced peace officers. In addition to this, on the emergence from Mexico, the appellants took a taxicab to make a trip of sixty-seven miles over a route where public bus transportation was available. It is to be remembered that all of these events occurred in a setting adjacent to the Mexican border where narcotics smuggling is prevalent. The appellants had just returned from Mexico where narcotics are known to be available.

[1]The knowledge regarding the possession of some $5,000.00 in cash had its source in the abortive search conducted on July 5, 1967, when appellants were stopped near Nogales, Arizona. The trial judge specifically found that the July 5 search was in fact an arrest and was based on reasonable cause. He concluded that the resultant search was "valid and lawful". These findings and the conclusions of law based thereon are not made the subject of attack by the appellants.

Details of the informer's report were independently corroborated by the officers. The informer had advised that the two Negro men were to arrive in Nogales on or about the 5th of June, 1967, and they did; he said they were in Nogales, Mexico waiting for the narcotics dealer, Martinez, to return, the officers knew the appellants to be in Mexico at the time. The appellants were similar in appearance to the men described by the informer as waiting in Mexico to make a purchase of narcotics. The informant advised that the sale had been made and a purchase price of $4,000.00 paid. Appellants were known to have at least this amount of money available. Very shortly thereafter the appellants crossed into the United States and were traveling by taxi from Nogales to Tucson, itself an unusual action.

Probable cause for arrest exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information prior to the arrest is sufficient to warrant a man of reasonable caution in believing that an offense has been or is being committed by a person or persons so to be arrested. *McCray v. Illinois,* 386 U.S. 300 (1967); *Brinegar v. United States,* 338 U.S. 160 (1949); *Hollins v. United States,* 9 Cir., 338 F. 2d 227 (1964). Here the test of probable cause was amply met. The arrest was lawfully made with probable cause. It follows that the Court properly rejected the motion to suppress the evidence secured in a search incident to this lawful arrest.

It is strenously urged that proof of possession of the contraband by the appellants was not shown. Concededly proof of possession in this case must rely on circumstantial evidence. However, the circumstantial evidence here is substantial. No package was present on the back seat of the police car when Riley and Marshall were placed therein. When they were taken out the package was seen. Additionally, Marshall was observed to have put his hand into his shirt and move it toward the back of his person. Shortly after they were taken from the police car, Riley, apparently unable to contain himself, asked if "the Mexicans turned him in."

It is too well established to merit argument that proof of possession of narcotics may be by way of either direct or circumstantial evidence. *Rodella v. United States,* 9th Cir., 286 F.2d 306 (1960).

The further point is raised that, even though evidence might indicate possession by Marshall, no proof of possession by Riley is shown. However, possession may be sole or joint and two or more persons may have joint possession of a thing. *Juvera v. United States,* 9th Cir., 378 F.2d 433 (1967). In the instant case the appellants had been together for several days; had gone to and returned from Mexico together; were traveling together in a taxicab on a sixty-seven mile trip and additionally Riley's volunteered inquiry as to whether they had been turned in by certain Mexicans all indicate a joint venture and a joint possession of the heroin package. The jury was properly instructed on the law of possession. In upholding the jury verdict we must take the view of the evidence most favorable to the government. *Glasser v. United States,* 315 U.S. 60 (1942). We are satisfied that the record supports the tacit finding of joint possession of the contraband by the appellants.

The next citation of error deals with the admission in evidence of statements made by Riley shortly after his arrest. This alleged error is based on a contention that the statements made were the fruits of an unlawful arrest. We have dealt with that question and reiterate that the arrest was lawful. Consequently this alleged error is groundless. No contention was made that the statements were not voluntary. However, we should state that there was a full compliance with the teachings of *Miranda. Miranda v. Arizona,* 384 U.S. 436 (1966). The statements came not only after the *Miranda* warnings, but in the face of the advice of the officers not to talk.

As a second facet of the foregoing alleged error regarding the admission of Riley's post-arrest statements, on behalf of the appellant Marshall error is claimed in the purported failure of the trial judge to instruct the jury that such statements were admissible only against Riley. No specific instruction was requested and no objection to the failure to give such instruction was made. Under these circumstances this failure constitutes a bar to the raising of this question on appeal. Rule 30, Federal Rules of Criminal Procedure; *Lopez v. United States,* 373 U.S. 427 (1963); *Smith v. United States,* 9th Cir., 390 F.2d 401 (1968).

Additionally, the trial judge did instruct the jury that each defendant was entitled to have his case decided from his own

acts and statements and from other evidence in the case which was applicable to him.

Appellants do not argue this specific citation of error in their brief nor are any authorities cited in support of the claimed error. On balance we are not persuaded that plain error such as is contemplated by Rule 52(b) of the Federal Rules of Criminal Procedure exists.

In the pre-trial stage of the proceedings appellants sought to procure disclosure of the identity of the informer. The trial judge refused to order the government to name the individual and error was predicated on that refusal. The information received from the informer was, of course, only used in the preliminary proceedings before the judge on the motion to suppress. The evidence of information furnished by the informer dealt solely with the lawfulness of the arrest which in turn bore on the admissibility of the contraband found in the police car.

The so-called "informer's privilege" is in reality a privilege frequently granted to the government to withhold from disclosure the identity of persons who furnish police officials with information relative to violations of the law. The purpose of the privilege is to protect the government's sources of information and in this way facilitate law enforcement by the preservation of anonymity of individuals willing to furnish information. Such anonymity is felt to be necessary to protect informers from reprisal and to encourage citizens to report law violations in the interests of a well ordered society. *Roviaro v. United States,* 353 U.S. 53 (1957). The necessary use of informers and consequent dependence on the privilege is markedly prominent in the enforcement of the narcotics laws.

The privilege is not absolute and must be granted or denied by the trial judge in the exercise of sound judicial discretion. As in the case before us, the question most frequently arises in a situation where the validity of an arrest and a consequent search and seizure of contraband or other physical evidence of law violation is challenged. An arrest, to be lawful, with or without warrant, must be based on probable cause to believe the person to be arrested has or is about to commit a crime. If the arrest was not lawful, the search and seizure incident to the arrest will be invalid and the evidence seized will be suppressed.

Often the knowledge of the arresting officer on which he must base the requirement of reasonable cause has been gained in whole or in part from an informer. Appellants rely heavily on the teachings of the United States Supreme Court in *Roviaro*, supra, a leading case on the issue of the informer's privilege.

In *Roviaro*, the informant played an integral part in the entire alleged illegal activity of the accused. This is best known by the Court's own description of the situation, found at page 64 therein:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure."

The case at bar is thus readily distinguishable from that of *Roviaro*. Here the charge was concealing and transporting a contraband narcotic and conspiring to do the same. The informer had nothing to do with the offense as such. The only issue here is as to the reasonable cause to make the arrest, not the ultimate issue of guilt or innocence.

The *Roviaro* court also discussed the line of cases where the legality of the search is in question and the communications of the informer are relied upon to establish probable cause. The writer of that opinion then criticized the practice of some courts in adopting the hard and fast rule requiring disclosure in such cases. The Court said at page 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the

possible significance of the informer's testimony, and other relevant factors."

Recently the United States Supreme Court has had an opportunity to review and interpret the *Roviaro* holding. *McCray v. Illinois*, 386 U.S. 300 (1967). The Court in McCray said of *Roviaro* at pages 311-312:

> "What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Indeed, we have repeatedly made clear that federal officers need *not* disclose an informer's identity in applying for an arrest or search warrant. As was said in *United States v. Ventresca*, 380 U.S. 102, 108, we have 'recognized that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant," so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved *'whose identity need not be disclosed* . . . was "credible" or his information "reliable."' *Aguilar v. Texas*, supra, at 114." (Emphasis added.) (Citing additional cases). And just this Term we have taken occasion to point out that a rule virtually prohibiting the use of informers would 'severely hamper the Government' in enforcement of the narcotics laws. *Lewis v. United States*, 385 U.S. 206, 210.
>
> "In sum, the Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search. . . ."

In *McCray*, the officers testified to the facts given them by the informant and that the informant had previously given reliable information about the narcotics violations. The Court then found

that the officers had facts and circumstances within their knowledge and reasonably trustworthy information sufficient to warrant a prudent man in believing the individual involved was committing or had committed an offense. The Supreme Court affirmed, holding it was not error for the trial court to permit the withholding of the identity of the informer.

As indicated above, the facts of the instant case disclose a stronger case for probable cause than appear in the *McCray* factual statement. Here the informer involved had furnished information leading to twenty or more prosecutions for narcotics violations. His assistance in the narcotics law enforcement of the area was important. If his "cover was blown", his usefulness would end. He was a paid performer whose life would be jeopardized upon disclosure. On the other hand, the informer would not be a witness as to the guilt or innocence of the appellants, only as to the validity of the officers' purported knowledge going to make up probable cause for an arrest. On appellants' motion for an order disclosing the identity the Court was required to make a discretionary ruling.

Under the circumstances of this case the trial court properly weighed the issue and in his sound discretion struck a balance in favor of nondisclosure. We think the trial judge correctly determined the matter. Certainly there was no abuse of discretion in the holding.

It is contended that appellants were convicted of a different crime than that described in the indictment. This contention is based on an alleged fatal variance between the proof adduced at trial and the allegations of the indictment. Count One of the indictment charged a conspiracy offense commencing on or about May 26, 1967 and continuing to on or about June 7, 1967. At the trial certain evidence was brought out regarding occurrences on May 17, 1967 and May 18, 1967 which might have been considered to be part of the charged conspiracy. This is a variance of some nine days.

While appellants claim error based on this relatively minor time lapse, they cite no authority nor do they allege either surprise or prejudice. As a matter of fact, the evidence of the acts prior to the date mentioned in the indictment was disclosed at the suppression hearing held almost a month before the trial.

Immaterial and nonprejudicial variance does not constitute reversible error. *Baker v. United States*, 9 Cir., 393 F.2d 604 (1968); also see *Ledbetter v. United States*, 170 U.S. 606 (1898). The remaining alleged errors concern statements of the United States Attorney made during closing argument. Defense counsel moved for a mistrial after the government's portion of the argument. The trial judge denied the motion. We have examined the alleged offending language and find it to have been within the scope of fair comment. Contrary to appellants' contention, nothing was said which constituted any comment on the failure of the appellants to take the stand or testify. We find no error in the rejection of the motion for mistrial based on the argument of government's counsel.

We have examined the other items of alleged error and find that they are either generally repetitious of those herein discussed or are without merit.

On the whole the record reflects that the appellants were fairly tried and that the evidence of guilt was substantial. We perceive no demonstrable error and must therefore affirm.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 358

JAMES RILEY JR. AND FRANK MARSHALL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1969. A petition for rehearing was denied on June 20, 1969. On July 19, 1969, the peti-

tion for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' arrest was based on probable cause, and whether, after the arrest, it was reasonable to seize the contraband heroin from the government vehicle where it had been left by petitioner Marshall.

2. Whether the trial court erred in refusing to require disclosure of the identity of the informant at the hearing on the motion to suppress.

3. Whether reversible error resulted from the trial court's instruction regarding the inference of knowing and unlawful importation flowing from petitioners' possession of the heroin.

4. Whether petitioners' convictions were in violation of their Fifth Amendment privilege against self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted on two counts of an indictment which charged a conspiracy to receive and conceal illegally imported heroin and the substantive offense of receipt, concealment and transportation of approximately five ounces of heroin, after importation from Mexico into the United States, in violation of 21

U.S.C. 173, 174 (1 R. 4-5).[1] On September 25, 1967, each petitioner was given concurrent sentences of ten years' imprisonment on each count.

During May 1967 in the border town of Nogales, Arizona, petitioner Riley was seen in the company of a known narcotics trafficker, one Campbell (2 R. 16-18, 37). A few days later, a "reliable" (2 R. 37, 55) informant who had provided consistently accurate information on narcotics importation in the past (see Pet. App. 10) advised American customs officials that Negro associates of Campbell were negotiating in Nogales, Mexico, with one Martinez to purchase heroin (2 R. 36-37). Later, the informant advised customs that these associates had made a purchase and returned to the United States, but that they would return for another purchase from Martinez about June 5, 1967 (2 R. 21-22, 29-30, 38, 72).

On June 4, 1967, petitioners (both Negroes) appeared in the company of a lady companion at Nogales, Arizona (3 R. 30). On June 5, they made numerous telephone calls, received money by Western Union, and approached the border area (3 R. 20, 32-33, 40). Thereafter, the three suddenly headed north in a rented car at speeds up to 105 miles per hour (2 R. 76, 3 R. 20). Customs officials stopped and searched them. They found no narcotics but found approximately $5,000 in petitioner Riley's possession

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[1] "R." refers to the four-volume record on file with the Clerk of this Court. Volume 1 is the court of appeals record, and contains the trial court's ruling on the motion to suppress (1 R. 44-54). Volume 2 contains the transcript of the pretrial hearing on the motion to suppress. Volumes 3 and 4 contain the trial transcript, consecutively paginated.

(3 R. 21, 183; 4 R. 247). The three were then released (3 R. 141).

On June 6, Miss Stanley, the lady companion, boarded a bus at Nogales, and the two petitioners, late that evening, after numerous telephone calls, crossed into Mexico on foot (3 R. 144; 4 R. 196-198). On June 7, the informant advised customs that two Negro males were in Nogales, Mexico, waiting for Martinez to return with some narcotics (2 R. 81). The waiting Negroes were described by the informant and from the descriptions the customs agents "easily recognized" that petitioners were the persons waiting for Martinez (Pet. App. 3; 2 R. 70, 81, 101). Later the same day the informant advised that Martinez had returned and that the two men had made a purchase in Mexico from Martinez, paying him the equivalent of approximately $4,000 (2 R. 39, 60, 67, 81-82). Thereafter, petitioners separately returned to the border station and were permitted to pass without being searched (4 R. 202-203, 207).

Subsequently on that same day, petitioners were seen riding in a taxi heading towards Tucson, Arizona. Customs agents Dennis and Anderson, and Arizona police officer Dunn, converged on the taxi as it pulled into the Tucson bus station and arrested petitioners (3 R. 122-124, 147). Since a crowd started to gather, petitioners were only given a quick frisk for weapons before being placed in Sergeant Dunn's vehicle for transportation to a state government building for a further search (3 R. 148; 4 R. 210). Before petitioners entered the government vehicle, Dunn observed that there was nothing on the

rear seat, other than some of his clothing which he placed between the two petitioners (4 R. 224). Dunn, sitting in the front, observed petitioners after they entered the rear of the vehicle. He saw petitioner Marshall place his right hand under the front portion of his shirt and move his hand towards the right rear of his person, an act consistent with a surreptitious removal of a package (4 R. 224). Agent Dennis then entered the front of the vehicle and told both petitioners to put their hands on their knees (4 R. 165, 225). Upon arrival at their destination, and as petitioners were in the process of alighting, Dunn noticed and called Agent Dennis' attention to the fact that "something had been left on the seat" of his car at the spot where petitioner Marshall had been sitting (4 R. 224, 226). This item, a plastic bag, was not retrieved immediately, as Dunn assisted in guarding petitioners while they were moved inside the building. From inside, Dunn watched his vehicle to make sure it remained undisturbed, and, upon the arrival of another police officer, he returned to the vehicle and removed the plastic bag which he gave to customs agent Washington (4 R. 227, 249). Agent Washington saw police officer Dunn go to the car and take out a bag which contained 5½ ounces of brown powder (4 R. 252-254). Later examination revealed this brown powder contained 60 percent pure heroin (4 R. 268-269).

Petitioners were then formally placed under arrest by the federal authorities for smuggling narcotics and were advised of their rights of silence and counsel as specified in *Miranda* v. *Arizona*, 384 U.S.

436 (3 R. 150-151). After petitioner Riley stated that he understood the warnings and despite the fact that he was then told by an officer to say nothing, Riley asked: "Did those Mexicans at Nogales turn me in?" (4 R. 280, 286-287). At that time the agent who received the inquiry had no intention of questioning Riley (2 R. 84; 4 R. 284).

ARGUMENT

1. As the courts below correctly held, petitioners' arrests were supported by ample probable cause. The informant, who had provided reliable information in approximately twenty prior cases, could fairly be believed as to the dealings of petitioners with the Mexican supplier, Martinez. Moreover, his information was corroborated by petitioners' own activities—*i.e.*, by their apparance in Nogales, Arizona, on about the day when the informant said the second sale was scheduled to take place and by their subsequent movement into Mexico with a large sum of money.[2] Peti-

[2] Petitioners raise as a question presented (Pet. 2), but do not argue, the point that when they were stopped on June 5, found to possess $5,000 and then released, they were then the victims of illegal action by the customs agents. This issue was not originally presented to the court of appeals (see Pet. App. 4, n. 1) and no "exceptional circumstances" are presented justifying review by this Court at this stage. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the district court held a hearing on the issue and found that the search of petitioner Riley's person on that date and the discovery of the $5,000 was incident to a lawful arrest. This finding was proper since by that time petitioners were conducting themselves in a manner corroborative of the informant's prior information that they were going to return to Mexico and engage in a narcotics transaction with Martinez.

tioners' suspicious activities witnessed thereafter by customs agents further bolstered the conclusion that they were involved in the purchase of heroin in Mexico and its illegal importation into this country. See *Draper* v. *United States*, 358 U.S. 307; *McCray* v. *Illinois*, 386 U.S. 300. Cf. *Spinelli* v. *United States*, 393 U.S. 410.

That petitioners were not arrested by the agent (Agent Cavitt) with the primary knowledge of what the informant had said as to the illegal narcotics transaction (2 R. 21-23, 37) is irrelevant since "probable cause is to be evaluated by the courts on the basis of the collective information of the police rather than that of only the officer who performs the act of arresting." *Smith* v. *United States*, 358 F. 2d 833, 835 (C.A.D.C.), certiorari denied, 386 U.S. 1008; see *United States* v. *Ventresca*, 380 U.S. 102, 111. The arrests being lawful, police could seize, without a search, property in plain view which the evidence indicates petitioners had left in the police officer's vehicle on their way to the state government building. In these circumstances, there was no "search" within the meaning of the Fourth Amendment, much less an invalid one. *Harris* v. *United States*, 390 U.S. 234; and see our brief in opposition in *Bourassa* v. *United States*, No. 530 Misc., 1969 Term.

2. No error resulted from the refusal of the trial court to require disclosure of the identity of the informant, an issue raised by petitioners at the pretrial stage of the case (see Pet. 14-15). Evidence was received as to the past reliability of the informant, and the trustworthiness of his reports pertain-

ing to petitioners was confirmed by the customs agents' own observations of the comings, goings, and overall activities of petitioners in the border area. Under these circumstances, the trial court properly declined to require disclosure of the informant's name at the hearing to determine probable cause for an arrest. *McCray* v. *Illinois*, 386 U.S. 300; *United States* v. *Ventresca*, 380 U.S. 102, 112; *Rugendorf* v. *United States*, 376 U.S. 528. In this regard, petitioners' reliance on *Roviaro* v. *United States*, 353 U.S. 53, is misplaced. There the prosecution's evidence on the merits indicated the informant was an active participant in the offense charged and that his identity was essential in order to prepare a defense at trial. This was of course not so in the instant case, as the court of appeals pointed out (Pet. App. 8, 10).

3. For the first time at any stage of the proceedings (see Pet. 10), petitioners contend that the trial judge committed reversible error in charging the jury with respect to the provision in 21 U.S.C. 174 which permits an inference of unlawful importation and knowledge thereof from evidence showing possession of narcotics.[3] While the validity of that presumption is presently before this Court in *Turner* v. *United States*, No. 190, 1969 Term, certiorari granted, June 2, 1969, we do not believe that there is per-

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[3] Proof of the fact of possession stemmed from petitioner Marshall's surreptitious actions in leaving a quantity of heroin in the police car while he and Riley were being transported to the state government building (see *supra*, p. 5).

suasive reason to defer consideration of this issue in the instant case until *Turner* has been decided.

The thrust of the government's evidence here was that petitioners had themselves purchased the heroin in Mexico and thereafter clandestinely introduced it into the United States. While the indictment did not charge them with actual smuggling, the evidence was certainly sufficient for the jury to conclude, wholly apart from any inference resulting from possession, that petitioners were well aware of the source of the heroin which they were transporting. In such circumstances, had petitioners raised an objection to the giving of the instruction—particularly if made on constitutional grounds—the government may well have agreed that the instruction could be dispensed with. The prosecution would have at least been alerted to a possible constitutional defense and, in the face of the strong direct evidence of petitioners' knowledge of the illegal importation, may well have decided to acquiesce in the defense objection to the charging of the presumption. In a case such as this, where knowledge of illegal importation was plain from the proven facts, petitioners should not be heard to interject a constitutional issue which a timely objection at trial might have avoided.[4] See Rule 30. F. R. Crim. P.

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[4] While it is true that in *Leary* v. *United States*, 395 U.S. 6, 32, the defendant did not object to an instruction relating to the similar presumption regarding marijuana, he had previously raised the issue, on constitutional grounds, in an earlier motion for a directed verdict at the close of the government's case and did so again in his subsequent motion for a new trial.

4. Petitioners also for the first time raise the claim that their convictions must fall on self-incrimination grounds under the rationale of *Leary* v. *United States*, 395 U.S. 6. They claim that the only way they could have legally possessed heroin under 21 U.S.C. 174 was by registering their possession under the taxing provisions of the Harrison Narcotics Act, but that to do so would have incriminated them under those provisions. The short answer is that petitioners were charged with illegal "transportation" and "concealment" under 21 U.S.C. 174, and not with smuggling narcotics in violation of that section. Their criminal responsibility thus did not turn upon any alleged requirement that they declare or invoice the heroin; their liability turned on the fact that they dealt with it illegally knowing of its illegal importation. Compliance with the statute thus required that they refrain from illegal transportation and concealment, not that they make any disclosure at all. Compare our brief in opposition in *Trujillo* v. *United States*, No. 96, 1969 Term.

There is further reason not to defer consideration of this aspect of the instant case pending this Court's decision in *Minor* v. *United States*, No. 189, 1969 Term, certiorari granted, June 2, 1969. That case involves the effect of asserting the privilege against self-incrimination of a seller of narcotics without an order form in violation of a provision of

the Harrison Narcotics Act (26 U.S.C. 4705(a)), and not, as here, an untimely claim of privilege regarding the unrelated importation statute, compliance with which would not have subjected petitioners to any "substantial risk of self-incrimination." *United States* v. *Covington*, 395 U.S. 57, 59; *Leary* v. *United States*, 395 U.S. 6, 13.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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